

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
July 11, 2007 Session

**SATURN & MAZER TITLE SERVICES, INC. v. AMSOUTH BANK**

**Appeal from the Chancery Court for Davidson County  
No. 05-405-II Carol L. McCoy, Chancellor**

---

**No. M2006-02074-COA-R3-CV - Filed January 16, 2008**

---

The issue on appeal is the extent of a bank's liability under the Uniform Commercial Code, Tenn. Code Ann. § 47-4-101 *et seq.*, for the payment of checks drawn on a bank customer's trust account over forged endorsements. The bank customer, a real estate title services company, filed this action seeking a refund of the face value of checks improperly charged to its trust account over forged endorsements. In granting summary judgment for the customer, the trial court found that the customer was entitled to recover the face value of two forged checks. The trial court, however, denied the claim regarding two other forged checks as being barred by the statute of limitations, and the court denied the customer's request for prejudgment interest. The bank appealed contending the customer cannot recover more than its actual losses, which are less than the face value of the checks. The customer appeals the denial of prejudgment interest. We have determined that the bank's liability is limited to the actual loss sustained by the customer, and find no error with the trial court's denial of prejudgment interest. Therefore, we reverse in part and affirm in part the decision of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court  
Affirmed in Part and Reversed in Part**

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ROBERT S. BRANDT, SP. J., joined. WILLIAM B. CAIN, P.J., M.S., not participating.

John R. Wingo and Derek C. Jumper, Nashville, Tennessee, for the appellant, AmSouth Bank.

C. Bennett Harrison, Jr., and Brian W. Holmes, Nashville, Tennessee, for the appellee, Saturn & Mazer Title Services, Inc.

**OPINION**

Saturn & Mazer Title Services, Inc. (Saturn & Mazer) is a real estate title services company that conducts real estate closings. At all times material to this action, Saturn & Mazer has been a customer of AmSouth Bank.

To facilitate the real estate closings, Saturn & Mazer maintained trust or escrow accounts at AmSouth Bank. Specifically, Saturn & Mazer used the escrow accounts as temporary repositories of funds belonging to others to make the necessary remittances to effect the real estate closings. Thus, Saturn & Mazer was holding funds that were the property of others in trust to facilitate the real estate closings. The matters at issue on appeal pertain to four checks written by Saturn & Mazer on its trust accounts as part of real estate closings conducted by Saturn & Mazer.

During the years 1998 through 2002, Saturn & Mazer conducted numerous real estate closings that involved attorney Patricia Carden. Four of the closings in which Ms. Carden was involved are the subject of this litigation. Ms. Carden, who has since been disbarred for engaging in felonious conduct to the detriment of Saturn & Mazer, AmSouth Bank and others with interests in the real estate closings, forged four checks drawn on Saturn & Mazer's trust account. The checks were issued by Saturn & Mazer payable to mortgage companies holding a secured interest in the real estate that was the subject of the respective closings. Unfortunately, none of the four checks at issue reached the intended payees and therefore the existing mortgages were not paid off and the deeds of trust were not released. Instead of delivering the checks to the mortgage companies, as Ms. Carden agreed to do at the closings, Ms. Carden misappropriated the proceeds by forging the name of the payee on all four checks and depositing the proceeds into accounts she controlled. The face value of the four checks drawn on the trust account of Saturn & Mazer totaled \$252,435.93.

It was not until October of 2002 that Saturn & Mazer discovered that Ms. Carden had misappropriated funds. At this time, Saturn & Mazer knew of the misappropriation of only two of the forged checks. Upon ascertaining what had occurred, Saturn & Mazer sought to recover the proceeds from Ms. Carden. Believing it had no reasonable options at the time, Saturn & Mazer accepted a promissory note from Ms. Carden in the amount of \$206,947.16, which was the aggregate amount of the misappropriated funds Saturn & Mazer had discovered.<sup>1</sup> The note was secured by Ms. Carden's home.

After obtaining the note from Ms. Carden, Saturn & Mazer discovered the other two forged checks that had been misappropriated by Ms. Carden. Before any action could be taken regarding the newly discovered checks, Ms. Carden defaulted on the note. When she failed to cure the default, Saturn & Mazer pursued its remedies against Ms. Carden, foreclosed on her home, and obtained a net recovery of \$190,055.00.

At all times material to this action, Saturn & Mazer was an agent of Ticor Title Insurance Company of Florida ("Ticor"). As its agent, Saturn & Mazer issued title insurance for the benefit of the buyers and their lenders on behalf of Ticor. When it was discovered that six mortgages had not been satisfied, Saturn & Mazer notified Ticor. While Ticor was processing the claims, Saturn & Mazer remitted monthly mortgage installments to prevent foreclosure on the six properties. The payments remitted by Saturn & Mazer to maintain the various mortgages totaled \$4,507.30.

---

<sup>1</sup>While Saturn & Mazer had only discovered two of the forged checks at the time the promissory note was accepted, it had also discovered two additional checks made payable to fictitious payees that Ms. Carden had misappropriated. Therefore, the amount of the promissory note reflects the aggregate amount of the two discovered forged checks plus the two checks made payable to fictitious payees.

Thereafter, Ticor satisfied the title insurance claims by remitting a total of \$331,744.19 to the respective mortgage companies to satisfy the liens that encumbered the properties. After crediting the net proceeds recovered from Ms. Carden, Ticor's damages totaled \$141,689.19. Saturn & Mazer's out-of-pocket expense, however, was \$4,507.30, the amount it paid to maintain the various mortgages while the claims were being processed.

Ticor and Saturn & Mazer entered into an agreement in December of 2004, whereby Ticor released any claims it had against Saturn & Mazer in exchange for the assignment of all causes of action, whether in tort, contract or otherwise, that Saturn & Mazer had against AmSouth for the charging of the checks at issue in this lawsuit. Thereafter, on February 11, 2005, Saturn & Mazer filed this action against AmSouth. In the Complaint, Saturn & Mazer alleged that AmSouth was liable, pursuant to Tenn. Code Ann. § 47-4-401 *et seq.*, in the amount of \$142,702.44, which represented the face value of the unauthorized payments from the trust account of Saturn & Mazer, less the partial recovery received from Ms. Carden. Saturn & Mazer also asserted a claim for prejudgment and post-judgment interest.

AmSouth answered the Complaint denying liability and asserting numerous affirmative defenses.<sup>2</sup> The defenses asserted included a statute of limitations defense and the "fictitious payee" defense. After conducting discovery and determining the relevant facts were essentially undisputed, the parties entered into a Stipulation setting forth the facts relevant to this case. Thereafter, each party filed a Motion for Summary Judgment. Saturn & Mazer sought summary judgment for the face value of the checks improperly charged to its trust account, less the amount recovered from Ms. Carden<sup>3</sup>. AmSouth sought summary judgment limiting Saturn & Mazer's recovery to no more than \$4,507.30, its actual losses, and on the ground that the claim on two of the checks were barred by the statute of limitations.

Following a hearing on the motions, the trial court granted summary judgment to Saturn & Mazer in the amount of \$131,132.95, which represented the face value of two of the forged checks (\$126,625.65) and the \$4,507.30 Saturn & Mazer paid to keep the mortgages current. The trial court granted summary judgment to AmSouth for the claims concerning the two forged checks that were discovered last, on the ground the claims were barred by the statute of limitations and the deposit agreement between the parties. The trial court also denied Saturn & Mazer's request for prejudgment interest. Both parties appealed.

#### **STANDARD OF REVIEW**

---

<sup>2</sup> AmSouth also asserted third-party claims against the banks that had accepted the checks from Ms. Carden and presented them to AmSouth. However, these claims were adjudicated through summary judgment and are not at issue in this appeal.

<sup>3</sup> Two other checks were the subject of claims asserted by Saturn & Mazer, each issued by Saturn & Mazer to a payee identified by Ms. Carden. The payees were fictitious and the payee's endorsement on each check was made by Ms. Carden or her agent. The proceeds were deposited into accounts Ms. Carden controlled. The claims for the two fictitious payee checks were summarily dismissed, and Saturn & Mazer does not appeal that ruling.

The issues were resolved in the trial court upon summary judgment. Both parties agree that there is no genuine dispute as to any material fact, as evidenced by the parties' agreement to the stipulation of facts. Accordingly, summary judgment is appropriate for deciding this case.

Summary judgments do not enjoy a presumption of correctness on appeal. *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003). This court must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997). We consider the evidence in the light most favorable to the non-moving party and resolve all inferences in that party's favor. *Godfrey v. Ruiz*, 90 S.W.3d 692, 695 (Tenn. 2002). When reviewing the evidence, we first determine whether factual disputes exist. If a factual dispute exists, we then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847 S.W.2d 208, 214 (Tenn. 1993); *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).

Summary judgments are proper in virtually all civil cases that can be resolved on the basis of legal issues alone, *Byrd v. Hall*, 847 S.W.2d at 210; *Pendleton v. Mills*, 73 S.W.3d 115, 121 (Tenn. Ct. App. 2001); however, they are not appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. The party seeking a summary judgment bears the burden of demonstrating that no genuine disputes of material fact exist and that party is entitled to judgment as a matter of law. *Godfrey v. Ruiz*, 90 S.W.3d at 695. Summary judgment should be granted at the trial court level when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion, which is the party seeking the summary judgment is entitled to a judgment as a matter of law. *Pero's Steak & Spaghetti House v. Lee*, 90 S.W.3d 614, 620 (Tenn. 2002); *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265, 269 (Tenn. 2001). The court must take the strongest legitimate view of the evidence in favor of the non-moving party, allow all reasonable inferences in favor of that party, discard all countervailing evidence, and, if there is a dispute as to any material fact or if there is any doubt as to the existence of a material fact, summary judgment cannot be granted. *Byrd v. Hall*, 847 S.W.2d at 210; *EVCO Corp. v. Ross*, 528 S.W.2d 20 (Tenn. 1975). To be entitled to summary judgment, the moving party must affirmatively negate an essential element of the non-moving party's claim or establish an affirmative defense that conclusively defeats the non-moving party's claim. *Cherry v. Williams*, 36 S.W.3d 78, 82-83 (Tenn. Ct. App. 2000).

#### ANALYSIS

Article Four of the Uniform Commercial Code, codified at Tenn. Code Ann. § 47-4-101 *et seq.*, governs bank deposits and collections. Tenn. Code Ann. § 47-4-401 provides the following:

**When bank may charge customer's account.** – (a) A bank may charge against the account of a customer an item that is properly payable from that account even though the charge creates an overdraft. An item is properly payable if it is authorized by the customer and is in accordance with any agreement between the customer and bank.

The official comment following this statute provides that “[a]n item containing a forged drawer’s signature or forged endorsement is not properly payable.” Tenn. Code Ann. § 47-4-401, cmt. 1. The parties agree that the four checks at issue on appeal contained forged endorsements and, therefore, were not properly payable by AmSouth.

When a bank charges an item (a check) against its customer’s account that was not properly payable, the customer needs to do little more than timely notify the bank of the unauthorized charge resulting from the forgery. If the bank then challenges whether the customer sustained a loss, an actual loss, as a result of the bank’s charging the customer’s account for the forged check, the customer merely needs to establish that it sustained a loss in the context of the unauthorized charge against the customer’s account. Typically, this is not a substantial burden, as the Colorado Supreme Court discussed in *Isaac v. American Heritage Bank & Trust Co.*, 675 P.2d 742, 744-47 (Colo. 1984). Although it is not normally a substantial burden, it is nonetheless the customer’s burden to establish that it – the customer – sustained a loss due to the bank’s action. *Id.*

Here, AmSouth Bank acknowledges that it charged the trust account of Saturn & Mazer a total of \$252,435.93 for the four checks that were improperly paid by the bank over forged endorsements. Nevertheless, the bank contends that the loss – the actual loss – sustained by Saturn & Mazer is only \$4,507.30, the amount of its “out-of-pocket” expenses. This defense hinges on the fact the funds that were paid out of the trust account were not the property of Saturn & Mazer, the bank’s customer; they were the property of others, the parties to the respective real estate closings. The complicating factor is that all of the funds improperly charged to “the customer’s account” were not the property of “the bank’s customer.”

The parties have not cited and we have been unable to find any Tennessee cases addressing the proper measure of damages based upon the unique facts of this case. Decisions from other jurisdictions, however, are instructive. As we learned from the *Isaac* case, the bank customer bears “the burden of proof to establish that *the customer* sustained a loss due to the bank’s improper payment of an item.” *See Isaac*, 675 P.2d at 744-47 (citing *Ed Stinn Chevrolet, Inc. v. Nat’l City Bank*, 503 N.E.2d 524, 535-37 (Ohio 1986)) (emphasis added). Indeed, as the Colorado Supreme Court noted, “If the bank customer suffered no loss as a result of the bank’s improper payment, he would be unjustly enriched by recovering the amount of the item from the bank. Therefore, the bank may come forward with evidence establishing that the customer did not suffer a loss.” *Id.* at 745. Thus, the burden of proof shifts as the parties present their respective cases. Therefore, the bank has the initial burden. Once the bank produces such evidence, “the ultimate burden of proof is on the customer. This is in keeping with the general principles discussed above that an injured party must prove his injury.” *Id.* at 745-46 (footnote omitted).

AmSouth does not dispute that it improperly charged Saturn & Mazer’s trust accounts on the four forged checks; however, AmSouth has come forward to establish that Saturn & Mazer did not suffer losses in the amount of the full face value of the checks. The bank established that the loss sustained by Saturn & Mazer was no more than \$4,507.30, the amount it remitted to keep the mortgages from going into default. Saturn & Mazer has failed to establish that it sustained any loss other than its “out of pocket” expense of \$4,507.30. Indeed, Ticor has sustained losses well in excess of \$4,507.30; however, Ticor was not the customer whose account was improperly charged for the

four checks paid over forged endorsements. The losses sustained as a result of the events at issue in excess of \$4,507.30 were sustained by Ticor, not the bank's customer. Moreover, the payments made by Ticor in the gross amount of \$331,744.10 and the net amount of \$141,689.19 were not for damages sustained by Saturn & Mazer; they were for damages sustained by Ticor's insureds.

The only loss suffered by Saturn & Mazer is evidenced by the checks written to keep the mortgages from going into foreclosure. Those checks total \$4,507.30. Thus, Saturn & Mazer is entitled to recover \$4,507.30 as its damages.

Saturn & Mazer appeals contending the trial court erred in finding that it was not entitled to prejudgment interest.<sup>4</sup> Prejudgment interest serves the purpose of compensating a party for the loss of funds to which it was legally entitled. It is a settled legal principle in this state that "[a]n award of prejudgment interest is within the sound discretion of the trial court and the decision will not be disturbed by an appellate court unless the record reveals a manifest and palpable abuse of discretion." *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998) (citing *Spencer v. A-1 Crane Service, Inc.*, 880 S.W.2d 938, 944 (Tenn. 1994); *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn. 1992)). Pursuant to this standard, we are required to give great deference to the trial court in the decision of whether to award prejudgment interest. *Myint*, 970 S.W.2d at 927.

Our courts are to consider three general principles when deciding whether to award or deny a request for prejudgment interest. First, we are to keep in mind that "the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing." *Id.* The other two principles to be considered are whether the amount of the obligation is certain and not disputed on reasonable grounds, and whether the existence of the obligation itself is not disputed. *Id.*

This entire action centered on the dispute between the parties as to the amount of AmSouth's obligation to Saturn & Mazer, the amount of which was reasonably in dispute. The trial court found it would be "unjust to impose prejudgment interest on AmSouth as a result of the conduct of third parties." We are unable to conclude that this decision constitutes a manifest or palpable abuse of the trial court's discretion. Thus, we affirm the trial court's discretion to not award prejudgment interest.

## IN CONCLUSION

The judgment of the trial court is affirmed in part and reversed in part, and this matter is remanded with instructions for an entry of a judgment consistent with this opinion. Costs of appeal are assessed against Saturn & Mazer.

---

<sup>4</sup>Based on the conclusion above that Saturn & Mazer is limited to actual damages, all other issues raised on appeal are moot.

---

FRANK G. CLEMENT, JR., JUDGE